Before the Appellate Body

DS363 China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products

Third Party Written Submission
by the European Communities

Geneva
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I. INTRODUCTION

1. The European Communities makes this Third Party Written Submission because of its systemic interest in the correct interpretation of the General Agreement on Tariffs and Trade (GATT 1994) and the General Agreement on Trade in Services (GATS), as well as in the correct interpretation of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("the DSU").

II. ARTICLE XX (a) GATT

2. The European Communities would first like to comment on the question of the availability of Article XX GATT 1994 as a defence with regard to violations of China's Accession Protocol obligations, in particular in the light of the analysis conducted by the Panel in this dispute.

3. As indicated in its Third Party Written Submission during Panel proceedings, the European Communities is of the opinion that Article XX GATT 1994 does not directly apply to China's Accession Protocol commitments. This is based on the principle that it should only be possible to invoke exceptions within the specific agreement in which they are contained. In this particular case, while Accession Protocol commitments are an integral part of the WTO Agreement, they are not a part of the GATT 1994. The European Communities therefore considers that Article XX GATT 1994 is not directly applicable to paragraph 5.1 of China's Accession Protocol.

4. However, the European Communities also wants to recall its view that the introductory "without prejudice clause" of paragraph 5.1 of China's Accession Protocol entitles China to regulate trade "in a manner consistent with the WTO Agreement" and that, as a result of this clause, Article XX GATT 1994 becomes indirectly relevant for the interpretation of China's obligations under the said paragraph. The question is whether the indirect relevance of Article XX GATT 1994 with regard to China's right to "regulate trade" would allow China to also restrict the "right to trade", which is what China's obligation in paragraph 5.1 relates to.
5. The European Communities further recalls that it had emphasised in its Third Party Written Submission the need to distinguish "regulating trade" from "regulating the right to trade" in paragraph 5.1. It had suggested that the "without prejudice clause", which qualifies China's right to regulate trade, could refer to "general regulations of trade such as TBT and other measures that restrict trade, and thus affect trading opportunities, but not specifically the right to trade". The implication was that affecting the right to trade through WTO-consistent regulations of trade could not be excluded, but that Article XX GATT 1994 could only become relevant with regard to the right to trade through its (indirect) relevance in respect of regulations of trade, and to the extent that Article XX is applicable and relevant to these regulations of trade.

6. The Panel in this dispute has developed a careful analysis of paragraphs 5.1 and 5.2 of China's Accession Protocol, and paragraphs 83(d) and 84(a) and (b) of China's Working Party Report. Some parts of this analysis appear to the European Communities as particularly relevant to the question of the availability of Article XX as a defence against breaches of China's Accession Protocol commitments. In particular, the Panel has usefully pointed out that the final sentence of paragraph 84(b), according to which enterprises with trading rights have to comply with WTO-consistent requirements relating to importing or exporting, such as those concerning import licensing, TBT and SPS, is relevant to the interpretation of the "without prejudice clause" of paragraph 5.1. It has also concluded that, as a result of the "without prejudice clause" of paragraph 5.1, "China's right to regulate trade takes precedence over China's obligation to ensure that all enterprises in China have the right to trade". The Panel has also analysed how the "right to regulate trade" consists of a "right to regulate imports and exports" comprising both regulation directed at particular goods (e.g. TBT) and directed explicitly at imports and exports (e.g. import licensing) which we could consider the "core right" -, and a consequent right to regulate "who may import or export such goods".

7. The Panel has also taken the view that it would depend on two elements whether China's "right to regulate trade" would permit China to also regulate who can be the importers and exporters of the relevant goods. These two elements are, firstly, whether the

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1 Panel Report, paragraph 7.269.
2 Panel Report, paragraph 7.255.
3 Panel Report, paragraph 7.269.
regulation is "incidental (or necessary) to the regulation of the relevant goods", and, secondly, whether the regulation of importers and exporters is WTO-consistent.\(^5\)

8. In the opinion of the European Communities, this implies that in the view of the Panel, China's "right to regulate trade" encompasses both the right to regulate imports and exports, as well as the right to regulate the right to trade i.e. who may import or export, where this is incidental (or necessary) to the regulation of the relevant goods.

9. To the extent that this is the case, then in the opinion of the European Communities, the second element mentioned by the Panel in order to determine whether the "right to regulate trade" extends to who can be the importer or exporter, becomes irrelevant, or is at most mentioned ad abundantiam. This is because, as made clear by the "without prejudice clause" in paragraph 5.1, China's right to regulate trade has to be exercised always "in a WTO consistent manner". The key condition is therefore whether the regulation of importers and exporters is incidental, that is, necessary, to the regulation of the relevant goods.

10. The European Communities notes that the Panel has not conducted any analysis on whether the measures that it has found to be inconsistent with China's trading rights commitments under the Accession Protocol are incidental, in the sense of "necessary", to the regulation of the relevant goods. The Panel has nonetheless indicated that "none of the provisions which we have found to result in China acting inconsistently…are provisions which prohibit certain content or require content review prior to importation"\(^6\). In other words, none of the measures found to be inconsistent correspond to "core" measures "regulating trade", i.e. regulating imports and exports of the goods as such, but rather to measures regulating the "right to trade". The question that is still open is therefore whether these measures regulating the right to trade are "incidental/necessary" to the regulation of the relevant goods.

11. The European Communities notes that the Panel chose to examine arguendo China's Article XX defence, and had subsequently no need to revert to the issue of the availability of the defence given China's failure to show that its measures were "necessary"

\(^5\) Panel Report, paragraph 7.276.
\(^6\) Panel Report, paragraph 7.733.
under Article XX(a) GATT 1994. The European Communities nonetheless submits that, before the issue of the availability of Article XX as a defence can be logically addressed, the Panel would first need to show that the measures found to be inconsistent with its trading rights commitments are incidental (in the sense of "necessary") to the regulation of the relevant goods i.e., to measures that "prohibit certain content or require content review prior to importation".

12. The European Communities would submit more generally that the Panel erred in law by conducting a detailed analysis under Article XX of the GATT 1994, while leaving it explicitly open whether this Article at all applies to the breached accession commitment in paragraph 5.1 of China's Protocol of Accession. Under the most sensible legal structure such detailed analysis has to follow, and depend on, a positive finding of applicability which the Panel however did not make. Although the Panel could in this case conclude that the question of the applicability of Article XX of the GATT 1994 ultimately did not matter, given that its conditions were not all satisfied, the Panel's findings are not helpful for a resolution of the dispute between the parties. In particular, the Panel found that China's measures could in any event not be justified under Article XX because there existed less GATT-inconsistent (less restrictive) alternative measures, such as those pointed out by the United States. As a result of these findings, China does not know whether it can adopt these alternative measures without the risk of a renewed and successful WTO challenge. If China does adopt such measures, the United States has no knowledge as to whether it can successfully challenge such implementation measures. Not exclusively, but in major part, the answer to those questions would depend on whether Article XX of the GATT 1994 is at all available as a defence against breaches of the Accession Protocol. As already pointed out, the European Communities is convinced that this question deserves a negative answer, but this is also the question on which the Panel should have ruled before embarking on legal questions which may have no relevance at all, and the Panel's arguendo answers to which are not going to be helpful to the parties in the upcoming stages of this dispute.

13. The European Communities would like to also make some specific comments on China's arguments as put forward in its Appellant Submission. China does not agree with
the Panel's finding that the Chinese measures at issue\textsuperscript{7} are not "necessary" within the meaning of Article XX(a) of the GATT 1994 and bases its reasoning on three main arguments.

14. The European Communities would now like to comment on China's first assertion in its Appellant Submission, namely that the Panel erred in law and failed to make an objective assessment of the matter before it, when it considered that the state-ownership requirement in Article 42 of the Publications Regulation makes no material contribution to the protection of public morals in China. China also claims that the Panel also erred in finding that certain provisions excluding foreign-invested entities from importing (Articles X.2 and X.3 of the Catalogue, Articles 3 and 4 of the Foreign Investment Regulation, Article 4 of the Several Opinions and Article 21 of the Audiovisual (Sub-) Distribution Rule) make no material contribution to the protection of public morals in China.

15. In its submission, China claims that the Panel misrepresented China's arguments, and in turn this "affected the Panel's ultimate conclusion that requiring publication import entities to be wholly state-owned does not contribute to the protection of public morals in China".\textsuperscript{8} In fact China argues that the "Panel mistakenly reduces China's arguments to a mere "cost analysis",\textsuperscript{9} and then clarifies further that its argument "relates to the balance to be reached between the performance of a public policy function and the cost associated with performing such public policy function."\textsuperscript{10} China justifies its position by admitting that content review is a costly work which relates to a public policy function and as such "the State is not empowered to impose such burden on entities other than state-owned".\textsuperscript{11}

16. The European Communities notes that China's arguments in its Appellant Submission appear to provide support to the Panel's statements that "China contends that they need to be wholly-owned because content review is costly". In particular, China states that "…content review is a costly work…the State is not empowered to impose such

\textsuperscript{7} As specified in China's Appellant Submission, paragraph 5. footnote 3, these are the Catalogue and the Foreign Investment Regulation (Articles X.2 and X.3 as well as Articles 3 and 4); the Several Opinions (Article 4); the Publications Regulation (Articles 42 in conjunction with Article 41, and Article 41); the 2001 Audiovisual Regulation (Articles 27); the Audiovisual Products Importation Rule (Article 8); and the Audiovisual (Sub-) Distribution Rule (Article 21).

\textsuperscript{8} China Appellant's Submission, paragraph 16.

\textsuperscript{9} Ibid. paragraph 18.

\textsuperscript{10} Ibid. paragraph 19.

\textsuperscript{11} Ibid. paragraph. 20.
burden on entities other than state-owned..." and that "...this is the main reason why publications import entities are required to be state-owned companies". Moreover, the European Communities does not understand China's assertion that the costs relating to a public policy function cannot be imposed on privately-owned enterprises. Content review for reading and other audio-visual products is comparable to a marketing approval for pharmaceutical products or other highly regulated goods, which are measures taken by the importing country to pursue the protection of consumers in areas such as human, animal or plant health, public morals etc. It would appear perfectly normal that the costs of such marketing approval procedures have to be borne by the private enterprises which import and market such products and which then are eventually passed on to the consumer. The European Communities fails to understand why this situation should be different to that related to the importation and marketing of printed and audiovisual products.

17. In fact, the Panel had given some thought to arguments that China could have advanced in its defence, but did not do so. For example, the Panel indicated that "it is not apparent that wholly state-owned enterprises would be inherently more careful in conducting content review than privately owned ones" and that "there does not appear to be any reason to think that privately owned enterprises would be less likely to comply with the content review requirements than wholly-state owned ones".

18. The Panel had added another element to this analysis related to the cost of content review by actually looking into evidence submitted by China. It stated that based on the very limited evidence which had been presented to it, "China in our view has not demonstrated that it would be unreasonable, or futile, to try to impose the cost on such enterprises", that is non wholly-state owned, or privately owned enterprises.

19. China also claims that the Panel misrepresents its arguments that only wholly state-owned enterprises are "currently capable of satisfying the requirements that publications import entities need to have a suitable organisation and qualified

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12  China's Appellant Submission, paragraphs 20 and 21.
personnel". However the Panel was not convinced by China's argument that the "cost associated with the need to

15 China's Appellant Submission, Paragraph 27.
have qualified personnel and a suitable organization is so high as to make it impossible, or not worthwhile, to fulfil this condition.\textsuperscript{16} The Panel was also not convinced that "privately owned enterprises would be unable to attract qualified personnel, or that they would be unable to obtain the organizational know-how needed to conduct content review properly."\textsuperscript{17}

20. China is again claiming that the Panel failed to properly analyse its arguments and that it had evaluated the issue merely on the element of "cost". It adds that its argument is "about the capacity to perform content review in a manner which allows preserving the intended level of protection."\textsuperscript{18} China seems to be implying that privately-owned enterprises are currently not able to "fulfil the technical and organisational functions set out in the relevant Chinese laws and regulations"\textsuperscript{19}, and this is precisely why they do not qualify, while on the other hand, Chinese state-owned enterprises, which are able to fulfil these requirements, are able to qualify and fully abide with relevant Chinese laws and regulations.

21. The European Communities would tend to disagree with China's assertions. Firstly, one cannot know if privately owned enterprises would be able to fulfil the criteria of Chinese laws and regulations if they are not even given the chance or opportunity to do so. Another important element to note, in the opinion of the European Communities, is that the actual "content review" is performed by specifically qualified persons who have the necessary expertise and qualifications to perform the job required of them. These persons are individuals who have the capacity to evaluate and review the material put before them, and also to assess whether it could or could not be released into the Chinese domestic market.

22. Since the activity of "content review" is executed by persons, who can be employed to perform this task either by state-owned or by privately-owned enterprises, one could reasonably presume that there could be a situation in which privately-owned enterprises could also perform "content review" if properly trained staff were employed. This would obviously come at a cost, as China purports, but the fact that there is a cost

\textsuperscript{16} Panel Report, Paragraph 7.858
\textsuperscript{17} Ibid.
\textsuperscript{18} China's Appellant Submission, Paragraph 29.
does not in itself appear to imply that only state-owned enterprises could employ such personnel. Moreover, even if it was justified that the activity of "content review" would have to be carried out by state entities, this does not make it necessary to prohibit the importation of such products by privately-owned enterprises. In such situations, privately-owned enterprises could submit the products that are to be imported to the state entity which is carrying out the "content review" against the payment of a fee before importing or marketing the products.

23. The European Communities is thus not convinced by the arguments put forward by China in its Appellate Submission and thus would disagree with China's assertion that the Panel erred in law and failed to make an objective assessment of the matter before it, in violation of Article 11 of the DSU, by concluding that these measures are not "necessary" to the protection of public morals in the meaning of Article XX(a) of the GATT 1994.

24. The European Communities would now like to make some comments on China's second assertion related to the interpretation of Article XX (a) GATT 1994 when it claims that the Panel erred in interpreting Article XX (a) GATT 1994 as requiring the Panel to also weigh the restrictive impact that the measures at issue may have on those wishing to engage in importing, in particular on their right to trade.

25. In the opinion of the European Communities, the Panel was correct in its analysis, and the European Communities fails to see any "circular reasoning" as China is alleging.\textsuperscript{20} The Panel has explained, that after \textit{proceeding on the assumption} that Article XX GATT 1994 is available as a defence for measures inconsistent with China's Accession Protocol, and consistent with the Appellate Body in \textit{US-Gambling}, it was "to weigh not only the restrictive impact that the measures at issue have on imports of relevant products, but also the restrictive impact they have on those wishing to engage in importing, in particular on their right to trade.\textsuperscript{21} The Panel then proceeded to do just this, which in the view of the European Communities was correct.

\textsuperscript{19} Ibid.
\textsuperscript{20} China's Appellant Submission , paragraph. 43.
\textsuperscript{21} Panel Report, paragraph. 7.788.
26. In the opinion of the European Communities, the Panel was right in its order of analysis of the present case, as it first analysed Article 5.1 of China's Accession Protocol and then proceeded to analyse Article XX GATT 1994. The Panel's "addition of another criterion" in the present dispute, does not equate, as China is claiming, to the situation in US-Gasoline. In that case, as the Appellate Body explained:

"…..the Panel here was in error in referring to its legal conclusion on Article III.4 instead of the measure at issue. The result of this analysis is to turn Article XX on its head. Obviously there had to be a finding that the measure provided "less favourable treatment" under Article III.4 before the Panel examined the "General Exceptions" contained in Article XX."22

27. In the case at hand, the Panel, as suggested by the Appellate Body in US-Gasoline, has first established the violation of a substantive WTO obligation (Article 5.1 of the China Accession Protocol) and proceeded subsequently to the analysis of Article XX GATT 1994.

28. China alleges in its Appellant's Submission that the Panel found that the "discretion" and "exclusion" provisions were not "necessary" in particular because of their significant trade restrictive impact on those wishing to engage in importing.23 China further argues that it was not appropriate for the Panel to consider the restrictive impact of these provisions on those wishing to import, essentially because this restrictive impact had already been considered by the Panel in order to establish that these measures were in violation of China's trading rights commitments. China cites the Appellate Body Report on US-Gasoline in support of this argument.

29. In the opinion of the European Communities, the Panel was right in considering the restrictive impact of these provisions on those wishing to import as part of its analysis. The purpose of this analysis was to determine whether the measures were "necessary" in the sense of Article XX(a) GATT 1994, that is, in order to achieve objectives relating to public morals. According to Appellate Body jurisprudence, this requires a weighing and

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23 China's Appellant Submission, paragraph 42.
balancing of factors including the importance of the interests and values at stake, the contribution of the measure to the realisation of the ends pursued by it, and the restrictive impact of the measure on international commerce.

30. The restrictive impact of the measure on international commerce requires that one takes account of this impact, including where this restrictive impact has been the reason why the measure has been found violates WTO obligations in the first place. Indeed, the "necessity" analysis is precisely about determining whether the measure having such trade restrictive impact in violation of the relevant commitments, is "necessary" to achieve the objectives pursued. If it is shown that a less trade restrictive alternative exists, that is, that a measure is reasonably available that does not have such trade restrictive impact - and is therefore not in violation of the relevant commitments – and which also "preserves for the responding Member its right to achieve its desired level of protection with respect to the objective pursued"\(^\text{24}\), then the measure at stake will not be "necessary".

31. With regard to China's reference to the Appellate Body Report in US-Gasoline, the European Communities would wish to remark that, firstly, the analysis related to Article XX(g), which uses a different term than Article XX(a) – "relating to" as opposed to "necessary". As the Appellate Body noted on that occasion:

"[I]t does not seem reasonable to suppose that the WTO Members intended to require, in respect of each and every category, the same kind or degree of connection or relationship between the measure under appraisal and the state interest or policy sought to be promoted or realized."\(^\text{25}\)

32. Secondly, as the Appellate Body remarked in the same paragraph quoted by China, "[T]he chapeau of Article XX makes it clear that it is the "measures" which are to be examined under Article XX(g), and not the legal finding of "less favourable treatment"'. This is also applicable to this particular case, where the Panel examined the "measure" under Article XX(a), that is, it sought to establish whether the measure was "necessary" to achieve the relevant public morals objectives. As part of this examination, and once it had established the importance for China of a high level of protection of public morals in respect of the relevant products, and that some of China's measures (the so-called

\(^{24}\) Brazil-Measures Affecting Imports of Retreaded Tyres – WT/DS332/AB/R adopted on 17 December 2007, paragraph 156.
"criteria" provisions) materially contribute to the protection of public morals in China, the Panel turned to considering the restrictive impact of the measures on international commerce. One should therefore bear in mind that the Panel was considering the restrictive impact of the measures on international commerce as part of the necessity examination of the measure as such to achieve public morals objectives. The Panel was not examining, as China suggests through this quote, how the "restrictive impact" was "necessary" to achieve public morals objectives.

33. Furthermore, the Panel was bound to examine the restrictive impact of the measure on trading rights, as it would have otherwise run the risk of not conducting a proper assessment of the restrictiveness of the measure. In more general terms, it seems necessary to take account of the restrictive impact caused by a measure, including where this restrictive impact is the source of the inconsistency. Otherwise, most of the restrictive impact of any inconsistent measure would not be considered in the examination of "necessity". This would deprive the examination of "necessity" of its sense, as it would not serve to respond to the question of whether a less trade restrictive alternative exists – including one not having the restrictive effects that are the source of the inconsistency – that can "preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued".26

34. As an additional comment on the restrictive impact of the Chinese measures at issue, the European Communities would like to add that the effect of the measures is tantamount to a total ban on those entities who will never qualify to enter the Chinese market, due to the fact that only Chinese state-owned entities are deemed by the Chinese authorities to have the necessary capacity and resources to conduct "content review". All other entities which would like to benefit from China's commitment with regard to "trading rights" can never do so - as the system currently stands in China they are impeded from even entering the market.

26 Brazil-Measures Affecting Imports of Retreaded Tyres – WT/DS332/AB/R adopted on 17 December 2007, paragraph 156
35. The European Communities would now like to make some comments on China's third claim, namely that the Panel erred in law and failed to make an objective assessment of the facts, in considering that at least one of the alternative measures referred to by the United States was an alternative "reasonably available" to China.27

The European Communities does not hold the view that the Panel erred when it found that one alternative which had been proposed by the United States, "under which the Chinese Government would be given the sole responsibility for the conduct of the content review"28 is a genuine alternative that it is reasonably available to China. At this juncture, the European Communities would like to repeat the point that it has already made before the Panel in its written submission29 namely that:

"It would still be possible for the Chinese authorities to implement a content review system, without almost completely restricting the right to trade in these goods to a very small number of Chinese entities. This is due to the fact that it is the content of the material itself which is subject to a review, and not the entity or individual who is actually importing it into China. The content review system could in the view of the European Communities still be implemented through a set-up which is operated separately, and definitely not as required at present, i.e. that the content review operation needs to be carried out by the importing entities themselves. This view is further supported by the fact that content review for domestic products can be efficiently performed without identical or similar curtailments as imposed on imported products."

36. In its Appellant's Submission China comments that:"… the Panel is silent as to who should take care of removing inappropriate content from the imported products and how the proposed alternative could be implemented by securing that each importer would have appropriately removed such content".30 The European Communities' view on this issue is that WTO Panels do not have the task of providing a solution of how the alternative or alternatives being suggested would be implemented or be put into practice, but rather it is up to China to deal with the detail of how the implementation could take

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27 China's Appellant Submission, paragraphs 47-75.
29 First Written Submission of the European Communities, dated 4 July 2008, paragraph 29.
30 China's Appellant Submission, paragraph 68.
place. However it is up to the Panel to decide and find, on the basis of the arguments of the parties, whether there are other less trade-restrictive alternatives which can be implemented.

37. The European Communities does not see any reason to disagree with the Panel's conclusion when it stated that:

"...we consider that China has not demonstrated that the alternative proposed by the United States would impose on China an undue burden, whether financial or otherwise. As explained, it would appear that China could in any event lessen any burden by charging appropriate fees.\(^{31}\)

III. ARTICLE 13 DSU

38. The European Communities would like to refer to the statement made by the United States in its Other Appellant's Submission where it asserts that the State Plan which the Panel considered, was never actually submitted by China to the Panel. In fact, according to the United States, "China did not provide even the unwritten contents of the current (or any past or future) State plan.\(^{32}\) The United States claims that China had made some general comments about the coverage of the State Plan in its written replies to the questions put by the Panel, but the actual State Plan was never actually produced.

39. Nonetheless, when considering the issue of the State Plan, the Panel concluded that:

"Weighing these factors, we conclude that in the absence of reasonably available alternatives, the State plan requirement in Article 42 of the Publications Regulation can be characterized as "necessary" to protect public morals in China.\(^{33}\)

40. The European Communities would largely agree with the arguments put forward by the United States on this issue, and does not fully understand on what specific grounds could the Panel have made such a finding, especially if it had never been given the opportunity - as China had never produced it - to examine the actual measure – the State Plan itself. In the opinion of the European Communities, it is important that parties to

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\(^{31}\) Panel Report Para. 7.906.

\(^{32}\) U.S. Other Appellant Submission, 7 October 2009, para.31.

\(^{33}\) Panel Report, paragraph. 7.836
WTO disputes abide by the requirements of the DSU, and specifically as Article 13.1 DSU provides:

"A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate."

41. In fact as was held by the Panel in Turkey-Rice\textsuperscript{34}:

"……panels are under a duty pursuant to Article 11 of the DSU, to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case." In order to exercise such duties, panels have been given authority to "seek information and technical advice from any individual or body which [they deem] appropriate" by Article 13.1 of the DSU."

42. The Appellate Body also referred to this issue in Canada-Aircraft\textsuperscript{35} where it held that:

"If Members that were requested by a Panel to provide information had no legal duty to "respond" by providing such information, that panel's undoubted legal "right to seek" information under the first sentence of Article 13.1 would be rendered meaningless. A Member party to a dispute could, at will, thwart the panel's fact-finding powers and take control itself of the information-gathering process that Articles 12 and 13 place in the hands of the panel. A Member could, in other words, prevent a panel from carrying out its task of finding the facts constituting the dispute before it and inevitably, from going forward with the legal characterization of those facts."

\textsuperscript{34} Turkey-Rice (Panel) WT/DS334/R adopted on October 22, 2007 paragraph 5.15.

\textsuperscript{35} Canada-Aircraft (AB) WT/DS70/AB/R adopted on August 20, 1999 paragraph 188.
IV. GATS - CHINA'S COMMITMENTS ON "SOUND RECORDING DISTRIBUTION SERVICES" AND THE PRINCIPLE OF TECHNOLOGICAL NEUTRALITY

43. The European Communities would largely agree with the Panel's conclusions on this issue and its legal interpretations. It notably agrees with the Panel's conclusion that:

"...the inscription of "sound recording distribution services" under the heading of Audiovisual Services (Sector 2.D) of China's Services Schedule extends to the distribution of sound recordings in non-physical form, notably through electronic means".36

The European Communities would like to confirm the position taken vis-a-vis the Panel in its Third Party Submission and would like to re-iterate its remarks, as to what China refers to as "Network Music Services".

44. The European Communities disagrees with the view expressed by China that changes in digital technologies and communication networks, have necessarily resulted in the emergence of an entirely new type of services sector, which China is referring to as "Network Music Services", and which China distinguishes from "Sound Recording Distribution Services".

45. The European Communities also would disagree with China's statement, namely that it had demonstrated that "the application of the so-called principle of technological neutrality was irrelevant to the present dispute since network music services are a distinct service, not merely a new technological means to deliver sound recording services."37

46. China states that the Panel "came to the conclusion that there was no need, in interpreting China's commitment on "sound recording distribution services", to invoke the principle of technological neutrality"38. Indeed, China was correctly referring to a sentence in the Panel Report where the Panel did indeed make such a statement.39 However, in that same paragraph, the Panel continued to explain why it decided not to invoke the principle of "technological neutrality", and this was not due to the fact that this "was irrelevant since network music services are a distinct service", but due to the fact

36 Panel Report, paragraph 7.1265
37 China's Appellant Submission, paragraph 84.
38 Ibid. paragraph 85.
that there was no need for it to do so.\textsuperscript{40} In fact the Panel continued to provide the following explanation in the same paragraph:

"We have already found that the core meaning of China's commitment on these services includes the distribution of audio content on non-physical media. The principle of technological neutrality might have come into play had we found that China's commitment covered distribution on physical media and that there was doubt about whether it also covered the distribution of content on non-physical media. But this was not the case here."\textsuperscript{41}

V. CONCLUSION

47. The European Communities is grateful for having the opportunity to express its views as a third party in this dispute and looks forward to participating in the hearing.

\textsuperscript{40} Emphasis added.

\textsuperscript{41} Panel Report, paragraph 7.1258